BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>PARENTS ON BEHALF OF STUDENT,<br><br>v.<br><br>TUOLUMNE COUNTY CALIFORNIA CHILDREN'S SERVICES. | OAH CASE NO. 2012100238 |

# DECISION

Presiding Administrative Law Judge Bob N. Varma, Office of Administrative Hearings (OAH), State of California, heard this matter in Sonora, California, on May 7, 8 and 9, 2013.

Colleen A. Synder and Amber C. Lance, attorneys at law, appeared on behalf of Student. Mother was present throughout the hearing. Father and maternal grandmother were present during the afternoon session on May 7, 2013. Student was not present.

Donald R. Aron, attorney at law, appeared on behalf of the Tuolumne County California Children's Services (CCS)[1]. Margret Grolle, physical therapist for CCS, and Kathleen Amos, director of public health nursing, and the designated administrator for CCS, were present throughout the hearing.

On October 3, 2012, Student filed a request for due process (complaint) against CCS. On December 4, 2012, OAH issued an order joining the Sonora Elementary School District (District) and Tuolumne County Office of Education (County) as parties to this matter and resetting the 45-day time line for issuance of a decision.[2] On December 24, 2012, at the

[1] As used herein, the term "CCS" is applied interchangeably to both the California Children's Services, as well as to its local county designee, Tuolumne County California Children's Services. The application has no impact upon the outcome of this matter, except that any orders made herein apply to the Tuolumne County California Children's Services.

[2] District and County subsequently reached a settlement with Student and were dismissed from this matter.

request of the parties, OAH granted a continuance of this matter. Upon conclusion of the presentation of evidence and witnesses on May 9, 2013, at the request of the parties, the matter was continued and the record was left open until June 3, 2013, for the parties to submit written closing briefs. On June 3, 2013, the parties filed their respective briefs, the record closed and matter was submitted for decision.[3]

## ISSUES[4]

*Issue No. 1:* Did CCS commit procedural violations that resulted in the denial of a free appropriate public education (FAPE) to Student during the 2011-2012 and 2012-2013 school years, through the present, by:

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[3] Student's closing brief has been marked for identification as Exhibit S 21; and, CCS's closing brief has been marked for identification as Exhibit C 40.

[4] The issues are those set out in Student's complaint, as modified at the April 22, 2013 prehearing conference (PHC) in this matter, and as further modified at the hearing on May 7, 2013, and in this Decision. They have been reorganized, reworded and reframed in the interests of clarity and consistency with the applicable law. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Student's original Issue No. 1, and its sub-issues, have been renumbered as Issue No. 2, and the original Issue No. 2, and its sub-issues, are now Issue No. 1.

At the start of the hearing, on May 7, 2013, Student withdrew the following sub-issue: Did CCS commit procedural violations that resulted in a denial of FAPE to Student during the 2011-2012 and 2012-2013 school years, through the present, by failing to comply with the requirements of the Individuals with Disabilities Education Act (IDEA) as set forth in the issues raised in Student's complaint? Accordingly, this sub-issue will not be addressed in this Decision.

Student originally alleged the following sub-issue: Did CCS deny Student a FAPE during the 2011-2012 and 2012-2013 school years, through the present, by unilaterally reducing Student's physical therapy (PT) and occupational therapy (OT) services outside of the IEP team meeting process? Because this issue is substantively identical to renumbered Issue No. 1(b), it is subsumed by Issue No. 1(b) and is removed as a separate issue.

Student originally alleged the following sub-issue: Did CCS deny Student a FAPE during the 2011-2012 and 2012-2013 school years, through the present, by failing to implement services provided for in Student's individualized education programs (IEP's)? Because this issue is substantively similar to re-numbered Issue No. 1(b), it is subsumed by Issue No. 1(b) and is removed as a separate issue.

a. failing to actively participate in Student's IEP team meeting process;

b. unilaterally making decisions affecting Student's IEP services outside of the IEP team meeting process; and,

c. failing to consider Student's independent evaluations?

*Issue No. 2:* Did CCS deny Student a FAPE during the 2011-2012 and 2012-2013 school years, through the present, by:

a. failing to provide Student with adequate OT services; and,

b. failing to provide Student with adequate PT services?

## REQUESTED REMEDIES

Student seeks a finding that CCS denied her a FAPE. She seeks a determination that a prospective FAPE for Student, with respect to medically necessary OT and PT as related services in her IEP, consists of one hour per week of direct OT and two hours per week of direct PT. Student further seeks an award of compensatory OT and PT. Finally, Student seeks an order requiring CCS to participate in Student's IEP team meetings and to refrain from changing Student's services outside of the IEP team process.

## CONTENTIONS OF THE PARTIES

Student contends that beginning in November 2011, CCS unilaterally reduced and changed her medically necessary OT and PT that were in her IEP as related services. CCS disregarded the services set forth in Student's IEP, disregarded Student's and Parents' rights under the IDEA and immediately implemented the reduction in services without seeking any changes in Student's IEP through an IEP team meeting or addendum. Student asserts that CCS did not attend the June 2011 IEP team meeting, and when it did attend meetings in August 2012 and March 2013, it failed to participate in the development of the IEP. Student further contends that CCS failed to properly consider independent OT and PT assessments that Parents obtained. Finally, Student contends that the type and level of OT and PT that CCS has offered, and provided, to Student since November 2011 is not designed to provide her with a FAPE. As set forth below, Student established some, but not all, of her claims.

CCS contends that it is not required to provide Student a FAPE because it is not a public education agency. It asserts that any appeal Student has of CCS's decisions are improperly brought before OAH. CCS further contends that it is not bound by the IDEA, it has no responsibilities pursuant to Student's IEP, and its services are within its sole discretion to modify as it sees fit. CCS also contends that it has not denied Student a FAPE. As found below, CCS' contentions are without merit.

## FACTUAL FINDINGS

*Background and Jurisdiction*

1. Student is a five-year old girl who resides with her parents within the jurisdiction of District and CCS. CCS is a public agency under the auspices of the state, or a political subdivision of the state, providing related services to individuals with exceptional needs.

2. The issues in this case concern the 2011-2012 and 2012-2013 school years. Student turned three in July 2010 and became eligible for special education services from District. At all times relevant to this matter, Student was qualified for special education and medically necessary related services from CCS, which were placed in her IEP.

3. Student is eligible for special education services due to multiple disabilities, specifically under the orthopedically and visually impaired categories. She has a medical diagnosis of Cerebral Palsy, is hypotonic, has extremely low muscle tone, and lacks isolated control over individual muscles in her body. Student requires being positioned for most activities as she is unable to sit or stand on her own volition. Student is dependent for all care and mobility.

*Implementation of Interagency Agreement*[5]

4. The Tuolumne County Superintendent of Schools and the Tuolumne County Health Department California Children's Services entered into an interagency agreement (agreement) consistent with the requirements of Chapter 26.5, as set forth in the Legal Conclusions below.[6] The agreement covering the 2012-2013 school year is identical to the agreement covering the 2011-2012 school year, which is in the record. Accordingly, the terms set forth in the 2011-2012 agreement were in effect for all time periods relevant to this matter.

5. The agreement requires the identification of a medical therapy program liaison, whose responsibilities include development and implementation of interagency staff development activities, and training of medical therapy program therapists "to ensure they

[5] Within this Decision, some findings point out failures by the local education agency (LEA). These findings provide context and explain why the interagency system failed Student. District and County are not parties to this action, and no findings of a denial of FAPE are made as to them. Any ordered remedies are specific to CCS and are not applicable to District or County.

[6] Chapter 26.5 of the California Government Code (Chapter 26.5), was added in 1984 by Assembly Bill 3632. (Gov. Code, § 7570 *et seq*.) The addition of Chapter 26.5 rendered *Nevada County Office of Educ. v. Riles* (1983) 149 Cal.App.3d 767 obsolete.

have the knowledge of CCS policy and procedures to function effectively as a CCS representative in the IEP meeting." According to Kathleen Amos[7], CCS provides its staff with a copy of the agreement, but does not provide them any training regarding the interagency responsibilities under the agreement.

6. CCS and the LEA are required to plan joint staff development activities. There was no evidence that the public agencies had engaged in any joint staff development activities prior to the filing of this matter. Since the filing of this case, the public agencies have met to try to resolve problems related to the agencies' claimed failures to execute their respective duties under the agreement.

7. The agreement requires the LEA to provide CCS a copy of the IEP for any pupil who receives services from both agencies. The evidence established that, until the filing of this matter, the District had never provided CCS a copy of Student's IEP. Margret Grolle[8], physical therapist on contract with CCS, was the CCS representative at Student's IEP team meetings in the District. Ms. Grolle has attended somewhere between 50 and 100 IEP team meetings for students being served by CCS within Tuolumne County. She could not recall having been provided a copy of any of the pupils' IEP's at the meetings. It was "rare" and "sporadic" for CCS to receive a copy of a pupil's IEP. Contrary to the terms of the agreement, the established practice between the public agencies in this county was that the LEA did not share the pupils' IEP with CCS. It was also established practice for CCS to never request a copy of an IEP. This is consistent with Ms. Amos' view that CCS was not bound by the IEP.

8. The agreement sets out procedures and time lines for CCS to provide notice to the LEA regarding Medical Therapy Conferences (MTC's), and to forward to the LEA a copy of both the proposed and approved medical therapy plans.[9] The evidence established

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[7] Ms. Amos is the public health nursing director for Tuolumne County and the CCS administrator. In her capacity as administrator for CCS, she supervises all of the CCS staff in the county and manages the contracts for the county's medical therapy units (MTU's). She has been with the county for 26 years, and she has worked with the CCS program for the entire time. Ms. Amos has been the nursing director for 10 years and the CCS administrator for five years. She holds a Bachelor of Science in nursing and a public health nursing certificate.

[8] Ms. Grolle has been a physical therapist for approximately 26 years. She holds a Bachelor of Arts in human biology and a master of physical therapy degree. She has been a CCS contracted physical therapist in Tuolumne County since 1989. She was also a contracted physical therapist for the Tuolumne County Schools Office for eight years, and the Valley Mountain Regional Center for seven years.

[9] A MTC is a team meeting of Student's MTC team, consisting of the Student, Parents, the physician, occupational therapist, physical therapist and LEA representative, as

that Ms. Grolle complied with these requirements and the LEA was timely provided all required notices and plans for Student. The evidence also established that, consistent with the legal requirements discussed below, Ms. Grolle always invited the LEA to send a representative to Student's MTC's. However, a representative from the LEA never attended any of Student's MTC's.

9. The agreement requires the LEA to develop procedures to convene an IEP team meeting when CCS proposes a change in the pupil's medically necessary OT or PT. There are two procedures to do so. One process is for the LEA representative at the MTC to draft an IEP addendum, if the parent consents to the change in services. However, since no LEA representative ever attended Student's MTC's, this process was not utilized for Student. The other process is for the LEA to convene an IEP team meeting. Student's CCS services, as discussed below, were changed on multiple occasions during the 2011-2012 and 2012-2013 school years. The LEA was notified of the changes, but never convened an IEP team meeting to discuss and review the proposed changes. CCS immediately implemented the changes, despite Parent disputing the changes in services.

10. With respect to the responsibilities of CCS to notify the LEA of a potential change in services and the LEA's responsibility to convene an IEP team meeting, the evidence revealed a disturbing pattern of behavior between the public agencies in Tuolumne County. Ms. Grolle testified that many times CCS's prescriptions were for less than one year, and the time period for which a prescription is active did not always align with the dates on which a pupil's annual IEP may be drafted or reviewed. However, in all of her time with CCS, she could not recall a single occasion where the LEA actually convened an IEP team meeting because CCS's services were changing. Instead, the annual IEP would remain in effect until the next scheduled review. One reason for this pattern of conduct by the public agencies was that, until recently, according to Ms. Grolle, the LEA would simply write on the IEP that CCS services would be provided "per physician's prescription." Therefore, by delegating IEP team responsibilities to a physician who was not part of the IEP team, CCS and the LEA could argue that they remained compliant with the pupil's IEP.

*Dispute Resolution Under the Agreement*

11. If a dispute arises between CCS and the parent, the agreement requires CCS to provide the parents with information regarding their right to appeal CCS's decision and request a fair hearing under California Code of Regulations, title 22. As discussed herein, these are appeal rights available under CCS's system and do not provide the procedural safeguards set out in the IDEA. While the agreement requires CCS to provide this information, the agreement does not restrict parents to the processes set out in California Code of Regulations, title 22. The agreement further expressly provides parents the right to pursue a due process hearing under the IDEA and related Education Code sections.

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necessary. (Cal. Code Regs., tit. 2, § 60300, subds. (h) & (i).) The MTC provides medical case management of Student's medical disability qualifying her for CCS services.

12. When there is a dispute between parents and the LEA, and/or CCS, the agreement requires the LEA to request a due process hearing under the IDEA. Here, while Parent disputed the changes in services of CCS during the 2011-2012 and 2012-2013 school years, the LEA did not request a due process hearing to resolve the disagreement.[10] The interagency agreement further requires that if a parent files a request for due process hearing, CCS must continue to provide the level of medically necessary OT and PT that the child was receiving prior to the request for due process hearing.

13. The evidence established that District and County did not provide copies of Student's IEP's to CCS, did not timely convene IEP team meetings when CCS proposed changes in services and did not attend any of Student's MTC's. However, District and County's failures to comply with the agreement do not excuse CCS' failure to fulfill its responsibilities required by law and the agreement. As set out in Legal Conclusion 20, the regulations allow for any authorized person to request an IEP team meeting, which CCS could have done prior to unilaterally implementing changes in services, as discussed below.

14. The testimony of Ms. Amos, Ms. Grolle and Dr. Robert Haining[11] established that CCS did not believe it was bound by any services set out in Student's IEP, was not bound by the IDEA, and had no responsibility with respect to the IDEA other than to notify Student's IEP team what services CCS was providing to Student. This is consistent with why CCS never provided training to CCS staff regarding the agreement, never obtained copies of Student's IEP's, and implemented its changes to Student's services without regard to any procedural safeguards and rights extended to Student under the IDEA.

*Denial of FAPE to Student*

15. In analyzing whether an agency has met its obligations to provide a FAPE, a two-part inquiry is conducted. First, there must be a determination of whether the agency complied with the procedures set forth in the IDEA. This is followed by a determination of whether the pupil's IEP was reasonably calculated to provide the student with educational benefit. However, if a procedural violation impeded the pupil's right to a FAPE,

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[10] As found below, the LEA entered into settlement agreements with Parents to resolve disputes concerning the LEA's placement and services for each of the school years.

[11] Dr. Haining is a pediatrician, specializing in pediatric rehabilitation. He is Board Certified in physical medicine and rehabilitation, pediatrics and pediatric rehabilitation. He has worked in the field of pediatric rehabilitation for approximately 30 years. Dr. Haining is a member of several academies, including the Academy of Cerebral Palsy and Developmental Medicine. He is employed by Children's Hospital in Oakland, California. Dr. Haining has been a consultant physician for the CCS MTU's in multiple California counties from Eureka to Modesto and South Lake Tahoe. All in all, Dr. Haining is the medical consultant for approximately 10 MTU's. Dr. Haining also has a long history of providing unpaid volunteer medical services to needy children in multiple countries.

significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits, the violation constitutes a denial of FAPE and no further analysis is required under the second prong of the two-part inquiry.

*Procedural Violations*

*June 3, 2011 IEP*

16. On April 26, 2010, through the MTC, Dr. Haining prescribed OT and PT for Student two times per week, for 30 minutes per session. The prescription was for a six-month period. The services were direct therapy, meaning it was direct therapeutic treatment provided by the therapist to Student. In addition to working directly with Student, the therapist also provided instruction to Parents and modeled activities for Parents to do with Student in the home program. The prescription contained goals and objectives for both services.[12] Parents consented to these services.

17. A review of Student's services was conducted by CCS in July of 2010, and the service prescription remained the same as in April 2010. Relevant to the issues in this matter, on May 16, 2011, CCS conducted another review of Student's functioning and another medical therapy plan prescription was issued. Therapy services for both OT and PT remained at two times per week, 30 minutes per session, delivered in a direct therapeutic intervention model, and were prescribed for a six-month period, from May 16, 2011 to November 16, 2011.

18. As discussed above, Ms. Grolle's practice was to forward CCS's assessment information, therapy recommendations and prescriptions to the SELPA within days of the MTC meeting and the issuance of the prescription by Dr. Haining. The evidence supports that Ms. Grolle followed this practice with respect to the May 16, 2011 therapy plan and prescription. Therefore, therapy prescriptions from the May 16, 2011 therapy plan were the most current recommended CCS services at the time of Student's June 3, 2011 IEP team meeting, and were timely provided to the LEA.

19. For pupils that Ms. Grolle served, she was the designated CCS representative who attended the IEP team meetings. The assigned OT did not attend IEP team meetings. The practice between the public agencies had been to provide an IEP team meeting notice to Ms. Grolle prior to IEP team meetings where CCS services were part of the pupil's services. Neither Ms. Grolle, nor any other representative for CCS attended Student's June 3, 2011

[12] As the type, duration and frequency of Student's OT and PT through CCS changed during the 2011-2012 and 2012-2013 school years, Student's goals and objectives changed sporadically. As discussed below, this Decision does not determine whether CCS's services offered or provided Student a substantive FAPE. Accordingly, a discussion of what Student's goals and objectives were, and how they changed over time, is not necessary.

IEP team meeting. The evidence established that Ms. Grolle did not receive a notice for the June 3, 2011 IEP team meeting and she was not aware of the IEP team meeting from any other source. There was no evidence that the IEP team attempted to contact Ms. Grolle by telephone to conference her into the IEP team meeting on June 3, 2011.

20. Student asserts that CCS failed to participate in Student's IEP team meetings. It is clear that CCS was not represented at the June 3, 2011 IEP team meeting. However, it was the LEA that failed to provide CCS notice of the meeting. It is the LEA that is in charge of convening the IEP team meeting and therefore, it was the LEA's responsibility to try to attempt to teleconference Ms. Grolle into the meeting when she failed to appear. With respect to the June 3, 2011 IEP team meeting, CCS did not violate Student's procedural rights as CCS was not notified of the IEP team meeting and no attempt was made by the IEP team to conference Ms. Grolle into the meeting via telephone.

21. The June 3, 2011 IEP listed, as related services, CCS medically necessary OT and PT, direct therapy, two times per week, for 30 minutes per session.[13] The dates for the services were set as June 3, 2011, through June 16, 2012. The IEP provided that all of Student's special education and related services, except those provided during the summer extended school year period, were to be provided during this same period, from June 3, 2011, through June 16, 2012. The IEP provided that CCS's services continued to June 16, 2012, while CCS' prescription for the services ended in November 2012. Because CCS did not participate in the meeting, Ms. Grolle was not aware that the services were listed for an entire year rather than the six months set forth on the prescription. As discussed above, because the LEA's in this county do not share the IEP's with CCS, and because CCS never asks for copies, CCS remained unaware of the discrepancy between its prescription and Student's IEP.[14]

*Effective Date of the June 3, 2011 IEP*

22. Parents consented to the June 3, 2011 IEP, with the exception of the educational placement offer. James Frost,[15] director of the Tuolumne County Special

[13] Each party entered a copy of the IEP into evidence. While there were differences between each copy, they were not material to the findings in this Decision.

[14] Ms. Grolle stated that CCS remained unaware of the discrepancy until the filing of this matter. Sometime in October 2012, after the filing of this matter, CCS finally requested a copy of Student's educational records from the SELPA, which contained the June 3, 2011 IEP.

[15] Mr. Frost holds a Bachelor of Arts in economics, holds multiple teaching credentials and has taught both special education and regular education classes. He has been in the public education field for a substantially long time, having held the positions of both a vice principal and principal, and having been the Superintendent for the Calaveras Unified School District for 17 years, and the interim Superintendent for the Big Oak Flat Groveland

Education Local Plan Area (SELPA), testified that in this case, rejection of the classroom placement made it so that the remainder of the IEP could not be implemented. In effect, according to Mr. Frost, Parents' rejection of the classroom placement resulted in a rejection of the entire IEP offer of FAPE. CCS contended that Parents' rejection of the classroom placement invalidated Parents' consent to the CCS services and CCS was not bound by the June 3, 2011 IEP.

23. To the extent that CCS' contention is a defense to the alleged procedural violation of November 28, 2011, discussed below, the contention fails. First, as found above, the evidence established that Parents did consent to the CCS related services. Second, CCS continued to provide the therapy contained in the May 16, 2011 therapy plan, and Student continued to avail herself of these services. Third, the actions of CCS which form the basis for the alleged procedural violation discussed below occurred on November 28, 2011. On September 2, 2011, District and Parents entered into a settlement agreement. The settlement agreement explicitly gave parental consent to the June 3, 2011 IEP.[16] Accordingly, the June 3, 2011 IEP was in effect when CCS committed its November 28, 2011 procedural violation.

*November 2011 Change in CCS Services*

24. Once parental consent is obtained, a public agency is required to implement the IEP, and provide the special education placement and related services agreed upon. As set out in Legal Conclusions 12, 14 and 21 through 24 below, and confirmed in the interagency agreement discussed in Factual Finding 9 above, changes in CCS services provided pursuant to an IEP could only be implemented by changing the IEP. A unilateral reduction in IEP services without affording parents the right to participate in an IEP team meeting can significantly impede the opportunity of the parents to participate in the decision making process regarding the provision of a FAPE. Furthermore, it can also be a failure to materially implement an IEP.

25. In November 2011, CCS conducted another MTC review and evaluation of Student's condition, as the prior six-month prescription was due to expire. On November 28, 2011, a new prescription was written, drastically changing Student's CCS services. Student's medically necessary OT and PT services were changed from two times per week,

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Unified School District for two years. He has been the Tuolumne County SELPA Director since the start of the 2012-2013 SY.

[16] The settlement agreement states that if Student became ineligible for CCS services, District would convene an IEP team meeting to determine Student's eligibility for OT and PT services to be provided by District. At all relevant times, Student has remained eligible for CCS services. This dispute concerns the type and levels of those services. Accordingly, that provision of the settlement agreement between Student and District is not applicable to this matter.

30 minutes per session of direct therapeutic intervention, to two times per month, 30 minutes per session of monitoring.[17] The prescription was for one year.

26. Under Student's new monitoring program, the therapist used the two monthly visits to check how Student was doing, check on how things are progressing in the home program, and provide help to Parents. Beginning with this change, Student's goals were to be achieved primarily through the home program with periodic monitoring by the therapist, two times per month.[18]

27. CCS timely provided notice of the November 2011 MTC, the proposed changes and supporting reports, to the LEA. No representative of the LEA attended the MTC. Upon completion of the new prescription reducing services, the new therapy plan was timely provided to the LEA. No IEP team meeting was convened to discuss the changes in services. CCS immediately and unilaterally implemented the changes.

28. Parents did not agree to discontinuation of direct therapy and placement of Student on monitoring status. Ms. Grolle's contention that she believed Parents consented to the changes in services because they kept bringing Student to the therapy appointments, was contradicted by her admission that Parents continued to ask for more services. Dr. Haining recalled that Parents had never agreed to the changes in services.

29. CCS's immediate implementation of the changes to Student's medically necessary OT and PT from those contained in her IEP was a procedural violation of the IDEA that resulted in a denial of FAPE. Here, CCS knew its service recommendations were different from the services listed in Student's IEP.[19] While the LEA may be at fault for not

[17] Monitoring program is one where the therapist reevaluates the pupil's physical status, reviews the activities in the therapy plan being provided by the parents, caregivers, or LEA staff, and updates the therapy plan as necessary. (Cal. Code Regs., tit. 2, § 60300, subd. (k)(3).)

[18] There may well be a question of whether such a drastic reduction in Student's therapy would have permitted her to make meaningful progress towards her goals and whether the services offered by CCS would have provided Student a FAPE; however, as discussed below, due to the procedural violations that denied Student a FAPE, an analysis of whether Student's CCS services were designed to provide her an educational benefit is not necessary.

[19] This is true regardless of whether CCS had a copy of the June 3, 2011 IEP and whether it knew of the discrepancy between the IEP and the May 16, 2011 therapy plan. For over a year, CCS had recommended direct therapy, two times per week, for 30 minutes per session. These recommendations were forwarded to the LEA and Parent had consented to them in the past. Therefore, even without a copy of the June 3, 2011 IEP available to CCS, it knew that the new therapy plan would drastically change the last agreed to and implemented services.

convening an IEP team meeting, the evidence established that CCS took no steps to ask the LEA to convene an IEP team meeting. By changing the services without a change to the IEP or without utilizing the due process hearing procedures, CCS significantly impeded Parents' opportunity to participate in the decision making process concerning the provision of FAPE to Student.[20] It also caused a deprivation of educational benefit to Student as she lost services by CCS's unilateral act outside of the IEP development process, and therefore denied her a FAPE.

*Temporary Loss of OT Services*

30. In May 2012, Student's CCS occupational therapist, Katherine Bouchard, retired. The retirement was not a surprise to CCS. And while CCS advertised for a new occupational therapist, a new provider was unavailable in Tuolumne County until approximately October 2012.

31. Upon Ms. Bouchard's retirement, Student lost her OT services. CCS provided Parents with names of CCS-paneled occupational therapists in the Stockton, California, area. However, Mother declined these providers on the grounds that they lacked certification in feeding therapy.[21] When CCS secured the services of a new occupational therapist in Tuolumne County, Parents declined the provider on the ground that she did not have experience in feeding therapy. Had Parents accepted the provider, OT could have resumed sometime in November 2012.

32. CCS did not contend that Parents should have accepted the new occupational therapist in Tuolumne County and therefore, its liability should be mitigated. Instead, in September 2012, when Parents did not choose one of the therapists in Stockton, CCS provided Parents with additional information for occupational therapists outside Tuolumne County. Parents ultimately chose Pediatric Rehabilitation Services (Pediatric Rehabilitation) in Sacramento, California, to provide Student OT. CCS authorized the service. According to Ms. Amos, CCS wanted Parents to be comfortable with the occupational therapist and therefore it was willing to support their choice.

33. Student was without OT services from May 2012 to approximately January 2013, a period of eight months. However, Student was hospitalized in January 2013 and would not have been available for OT that month, had the service been available. Therefore,

[20] This conduct is consistent with CCS staff's view that they had no responsibilities under the IDEA.

[21] All occupational therapists can work on oral motor skills such as chewing. However, feeding requires skills such as swallowing, for which a separate certification is required. Student uses a gastrostomy tube (G-Tube) to receive some of her supplements and nutrients. Due to Student's feeding needs, Parents wanted an occupational therapist trained in feeding therapy.

Student lost all OT services for a period of seven months.[22] CCS was required to provide the OT services listed in Student's IEP. While CCS made good faith efforts to secure a new occupational therapist locally, Student's loss of all OT for seven months is a denial of FAPE as it is a material failure to comply with Student's IEP and resulted in a deprivation of educational benefit.

*August 23, 2012 IEP*

34. On August 23, 2012, District convened Student's annual IEP team meeting. Ms. Grolle attended as CCS's representative and discussed CCS's therapy plan and recommended services, which were consistent with the reduced services set out in the November 28, 2011 therapy plan. The two times per month, 30 minutes per session of OT and PT monitoring services, that CCS had implemented since November 28, 2011, were listed as the medically necessary OT and PT offer of services in the August 23, 2012 IEP. The IEP provided that the services would be provided from August 23, 2012, to August 23, 2013. The team also discussed that OT services had ceased since May 2012, and Parents requested that CCS OT services be reinstated and provided at an alternate facility from that in Tuolumne County. As discussed above, CCS provided Parents with information regarding providers outside of Tuolumne County.

35. Parents continued to protest the November 2011 reduction in CCS services and the May 2012 cessation of CCS OT services, and drafted an attachment to the August 23, 2012 IEP setting out their disagreement with the CCS services portion of the IEP. Parents clearly set forth their request to reinstate both OT and PT services to the direct therapy levels prior to the November 2011 change by CCS. They further requested CCS provide compensatory OT for the periods missed since May 2012.

36. Student contends that CCS failed to participate in the development of Student's IEP's. With respect to the August 23, 2012 IEP, Student failed to meet her burden. Ms. Grolle attended the meeting as CCS's representative and timely provided District and the IEP team CCS's recommendations for both OT and PT services. Nothing in the evidence established that Ms. Grolle was unresponsive to the IEP team members with respect to CCS's services. While it is true that Student was not receiving OT at this time and Parents did not agree with CCS's therapy plans or prescriptions, such disagreement does not equate with a failure to participate by CCS. Accordingly, CCS did not deny Student a FAPE with respect to its legal obligations to attend and participate in the IEP team meeting of August 23, 2012.

[22] The total deprivation of OT services for Student during the 2011-2012 and 2012-2013 school years is determined below when determining remedies.

*September 24, 2012 Changes to CCS Services*

37. On September 10, 2012, Ms. Amos sent Parents a letter in response to their exception to CCS services in the August 23, 2012 IEP. She invited Parents to a MTC on September 24, 2012, and provided an update on CCS's attempts to hire a new occupational therapist. On August 27, 2012, Ms. Grolle sent a letter to Parents attempting to set up a meeting with Parents to discuss Parents' dispute with the CCS services listed on the August 23, 2012 IEP. The letter included the procedures for Parents to appeal CCS's decision pursuant to California Code of Regulations, title 22. It further asked Parents to answer specific questions in preparation for the meeting. On September 13, 2012, Parents canceled the meeting, stating that the disagreement concerning CCS services should be discussed with the entire IEP team. Parent offered to initiate the setting up of an IEP team meeting with the District. CCS did not accept the invitation to participate in an IEP team meeting, and instead confirmed the September 24, 2012 MTC.

38. In preparation for the September 24, 2012 MTC, Ms. Grolle recommended medically necessary PT therapy to be provided to Student in an episodic delivery model. This model consisted of direct therapy, two times per week, for one month, followed by two times per month of monitoring for three months, followed by two times per week of direct therapy for one month, and the pattern of services to repeat. The evidence established that Ms. Grolle is a committed professional who cares deeply for Student and sympathizes with the difficulties experienced by Student's family. While she believed Student had reached a plateau in her acquisition of skills and was more suitable for a home therapy program with monitoring, Ms. Grolle was willing to try a different approach in case Student reacted with further growth in her skills.

39. However, at the MTC, Dr. Haining overruled Ms. Grolle's recommendations. Dr. Haining opined that, while the episodic model was being tried by more and more therapists, he had not seen sufficient evidence or research to support its use. Dr. Haining's PT prescription and therapy plan of September 24, 2012, not only rejected Ms. Grolle's recommendations, but further reduced Student's medically necessary PT to one time per month of monitoring services, for a period of six months. Parents, who were in attendance, did not consent to the further reduction.

40. Because Student had been without medically necessary OT since May 2012, due to the lack of an occupational therapist, there were no updated reports for Dr. Haining to consider at the MTC. Nevertheless, on September 24, 2012, Dr. Haining prescribed medically necessary OT. The physician's prescription of OT services was for Student to be assessed by an occupational therapist and treatment to be carried out as recommended in the assessment.[23]

[23] At the time of the prescription, Dr. Haining did not know who the OT would be that would conduct the evaluation and provide the services.

41. During the hearing Dr. Haining was insistent that only a physician can prescribe medically necessary OT and PT.[24] Both Dr. Haining and Ms. Grolle stated that this is why Dr. Haining could override her recommendations for the episodic therapy and actually reduce Student's PT services in September 2012. According to Ms. Grolle, the therapist makes recommendations to Dr. Haining and he determines the frequency and duration of the prescribed therapy. This view is also one reason why Dr. Haining did not give any consideration to Dr. Kristine N. Corn's report, discussed below.

42. The OT prescription of September 24, 2012, calls into question CCS's contention that only its physician can determine the level of therapy. The issuance of this prescription contradicts the testimony of Dr. Haining, Ms. Amos and Ms. Grolle on the role of the CCS therapists. This prescription gave unfettered authority to whichever CCS occupational therapist was to evaluate Student. There was no limitation on what the therapist could recommend and implement for the duration of that prescription. For example, the therapist could recommend that Student receive no further medically necessary OT or recommend that Student receive six hours of medically necessary OT per week. Regardless of what the therapist recommended, it would be in compliance with Dr. Haining's prescription. The prescription did not require Dr. Haining to review the evaluating therapist's report or recommendations, even though he was unaware of who the occupational therapist may be when the evaluation was done. By assigning or abdicating his authority in the OT prescription of September 24, 2012 to the therapist directly, Dr. Haining seriously undermined CCS's position that only the prescribing physician can determine the type and level of medically necessary therapy, which was one reason for CCS's assertion that OAH lacked jurisdiction to determine the issues in this matter.

43. Dr. Haining was very knowledgeable about the medical issues and needs of children with Cerebral Palsy. Ms. Grolle was very knowledgeable about physical therapy for children with Cerebral Palsy. Their expertise in their respective fields and their dedication to the children they serve is not questioned. However, on cross-examination Dr. Haining was unnecessarily defensive, argumentative and at points became so animated that he was banging on the table. He did not seem to understand that CCS has obligations to Student under the IDEA. Both Dr. Haining and Ms. Grolle displayed little understanding of CCS's obligations with respect to Student's IEP and the interagency agreement. Accordingly, on matters concerning CCS's obligations to Student under Chapter 26.5, their testimony was given little weight.

44. Once again, CCS implemented the September 24, 2012 changes in Student's IEP related services without any changes being sought or made to Student's IEP. There was no evidence to suggest that Ms. Grolle did not follow her standard practice of notifying the LEA of the changes in medically necessary OT and PT pursuant to the September 24, 2012 MTC. Consistent with the established pattern of behavior of the public agencies in this county, District did not convene an IEP team meeting, CCS did not ask for one, and CCS immediately and unilaterally implemented the September 24, 2012 prescription.

[24] Ms. Amos echoed this position.

45. CCS's unilateral changes in services again seriously impeded Parents' right to participate in the decision making process regarding the provision of FAPE to Student. It further caused Student a deprivation of educational benefits as she lost services without the benefit of an IEP team meeting and evaluation of what OT and PT services she needed to obtain educational benefit, and whether the services that were educationally necessary were the same as or exceeded the services that CCS deemed medically necessary. Accordingly, CCS's changes in Student's IEP services, as prescribed and implemented pursuant to the September 24, 2012 medical therapy plan, denied Student a FAPE.

46. Student filed this action on October 3, 2012. CCS has maintained the reduced level of medically necessary PT set forth in the September 24, 2012 therapy plan during the pendency of this dispute, rather than the level of services that predated the onset of the dispute in November 2011.[25]

*March 11, 2013 IEP*

47. On March 11, 2013, another IEP team meeting was convened for Student. Both Ms. Amos and Ms. Grolle attended the meeting on behalf of CCS. CCS informed the IEP team that on September 24, 2012, it had reduced Student's PT services to one time per month, on the monitoring program.

48. By the time of the IEP team meeting, Pediatric Rehabilitation had assessed Student for medically necessary OT on behalf of CCS, and recommended 12 sessions of OT therapy at the rate of one hour per session. The evidence did not establish whether this was an initial recommendation, to be reviewed after the provision of the 12 sessions, or whether this was for a specific duration such as six months or one year. Student had begun receiving these services from Pediatric Rehabilitation by the time of the March 2013 IEP team meeting, and the team was informed of Student's services through Pediatric Rehabilitation.

49. At the March 11, 2013 IEP team meeting, Parents continued to disagree with CCS's offer of services for medically necessary OT and PT. The IEP team discussed Parents' disagreement with CCS. There was no evidence to establish that either Ms. Amos or Ms. Grolle were unresponsive to the IEP team with respect to CCS services or recommendations. As discussed above, Student has asserted that CCS failed to participate in the development of Student's IEP's and thus, denied her a FAPE. With respect to the March 11, 2013 IEP Student did not establish that CCS failed to participate in the process. While the parties disagreed regarding CCS's offered services, the evidence did not establish that CCS failed to participate in the development of the IEP. Accordingly, CCS did not deny Student a FAPE with respect to its legal obligations to attend and participate in the development of Student's March 11, 2013 IEP.

[25] Student has not raised an issue of whether her right to stay-put was violated. Accordingly, as discussed below, this Decision does not address stay-put.

*Independent Evaluations*

50. Based upon Legal Conclusions 36 and 37 below, a parent is entitled to obtain and submit an independent assessment regarding a related service to the IEP team. If the assessment is one concerning OT or PT, upon submission to the IEP team, it shall be reviewed by the qualified medical personnel of CCS who conduct OT and PT assessments on behalf of CCS. The recommendation of the person who reviews the independent assessment shall be reviewed and discussed with the parent and appropriate members of the IEP team prior to the meeting of the IEP team. The recommendation of the qualified person who reviewed the independent assessment shall become the recommendation of the IEP team members who are attending on behalf of the LEA.

51. At the September 24, 2012 MTC, Parents presented Dr. Haining with an independent PT evaluation from Dr. Corn.[26] The evidence established that Dr. Haining gave the report a cursory review, handed it back to Parents and disregarded its recommendations. Dr. Haining did not consider Dr. Corn's report because she was not a medical doctor, was not a paneled CCS doctor, and because he did not agree with the report's contention that a child's age may affect whether therapy should be terminated or continued.

52. Ms. Grolle reviewed the report in preparation for the due process hearing. It was her opinion that Dr. Corn's findings regarding Student's gross motor functioning were not substantively different from her own assessment of Student's skills. Based upon her assessment of Student's functioning and her opinion that Student was capable of making progress, Dr. Corn recommended that Student receive two hours of PT per week to work on her posture, neck and trunk strength, improve Student's metabolism and respiratory control for increased breath control. Ms. Grolle disagreed with the recommendation. However, Ms. Grolle's review of the report and her disagreement with it were not presented to Parents or the IEP team as required by Chapter 26.5.

53. In November 2012, Parents obtained an independent OT assessment by Catherine Leavitt.[27] Ms. Leavitt recommended that Student needed direct OT two times per

[26] Dr. Corn is a licensed physical therapist, who holds a Bachelor of Science in physical therapy, a Masters of physical therapy and a Ph.D. in physical therapy. Dr. Corn has been a physical therapist since 1965. In her lengthy career, she has worked in the hospital setting, for United Cerebral Palsy, as a staff physical therapist for Sacramento County CCS, and in private practice, and has been a clinical instructor. She has assessed and treated hundreds of children. Dr. Corn has a specialization in children with neurodevelopmental delays, including children with Cerebral Palsy. She has previously been a CCS-paneled physical therapist and has provided therapy to children referred by various CCS agencies.

[27] Ms. Leavitt is a registered occupational therapist who practiced for approximately 30 years prior to her retirement. She has a Bachelor's degree in social studies and a Master's of Science degree in occupational therapy. Ms. Leavitt has worked in multiple settings in her

month in order to improve her oral motor skills, her hand and arm movements, and processing speed through a trial of the Therapeutic Listening Program.[28] There is no evidence that the report by Ms. Leavitt was provided to CCS prior to the March 2013 IEP team meeting.

54. Both Dr. Corn's and Ms. Leavitt's reports were presented to the March 11, 2013 IEP team. Dr. Corn participated in the meeting via teleconference. While the reports were presented at the March 11, 2013 IEP team meeting, there is no evidence that CCS followed through with its responsibility to review the assessments, discuss their recommendations with Parents and relevant members of Student's IEP team, and then meet with the IEP team, as required by law.

55. Student's contention that CCS failed to consider the independent OT and PT evaluations obtained by Parents has merit. CCS failed to give any consideration to Dr. Corn's and Ms. Leavitt's assessments and failed to make any recommendations in light of those assessments for the consideration of Student's entire IEP team, including the LEA members and Parents. In fact, the evidence established that CCS ignored the independent assessments of Dr. Corn and Ms. Leavitt. Accordingly, CCS has denied Student a FAPE by failing to consider these independent assessments, which denied Parents both valuable input from CCS and the opportunity for discussion that would have helped them meaningfully participate in the decision making process regarding the provision of a FAPE to Student. This constitutes a procedural violation that denied Student a FAPE.

56. However, the finding of this procedural violation is limited to the period from March 11, 2013, and thereafter. By law, CCS's obligations are not triggered until the independent assessments have been presented to the IEP team. In this case, while Dr. Corn's PT assessment was presented to Dr. Haining in September 2012, it was not presented to the IEP team until March 2013. Ms. Leavitt's OT assessment was not presented to the IEP team until March 2013 as well. Accordingly, CCS has denied Student a FAPE with respect to the consideration of independent assessments since March 11, 2013.

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lengthy career, including a hospital, schools, rehabilitation and convalescent settings and private practice. She has assessed 75 to 100 children. She holds a general secondary teaching credential and a community college teaching credential. Ms. Leavitt has also been a CCS paneled occupational therapist.

[28] According to Ms. Leavitt, this program was originally developed for children with Autism Spectrum Disorders. The program utilizes music and sounds to improve the processing speed of the individual. Ms. Leavitt believes the program has shown to be effective with children with other disabilities such as Cerebral Palsy. No finding is made as to whether this program would be appropriate for Student.

*Substantive Denial of FAPE*

57. As discussed in Factual Finding 15 and Legal Conclusion 4, when a procedural violation impedes the pupil's right to a FAPE, significantly impedes upon a parent's opportunity to participate in the decision making process or causes a deprivation of educational benefit to the pupil, the violation denies the student a FAPE. Once such a determination has been made, as it has here, the second prong of the two-part analysis need not be addressed.

58. Student contends that CCS denied her a FAPE because it failed to provide her adequate levels of medically necessary OT and PT designed to meet her unique needs related to her disability during the 2011-2012 and 2012-2013 school years.[29] Because CCS has already been deemed to have denied Student a FAPE for the 2011-2012 and 2012-2013 school years, further determination of what constituted adequate medically necessary OT and PT is not necessary.

*Remedies*

59. The ALJ has broad latitude to fashion an equitable remedy appropriate for a denial of FAPE. An agency may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. Compensatory education is an equitable remedy for the loss of a particular service. But, the law does not require that day-for-day compensation be awarded for time missed. Relief is appropriate that is designed to ensure the student is appropriately educated within the meaning of the IDEA, and is calculated to provide the educational benefit likely to have accrued had the agency provided the service in the first place.

60. In addition, compensatory education can be provided as remedy when there has been a material failure to implement the child's IEP. The child need not show actual regression to receive an award of compensatory education.

*Compensatory OT and PT*

61. As determined in Factual Findings 29 and 45, Student was denied a FAPE when CCS unilaterally reduced services beginning in November 2011, with further reductions in September 2012, outside of the IEP development process. As further determined in Factual Finding 33, CCS further denied Student a FAPE when it failed to provide medically necessary OT from May 2012 through January 2013. Student lost 20 months of medically necessary OT and PT, at the rate of two 30-minute sessions per week,

[29] A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

which equals approximately 80 hours of lost services each in OT and PT. However, the loss of OT is mitigated by the 12 one-hour sessions that began in February, 2013. The evidence did not clearly establish how many sessions have been provided since the implementation of the service.

62. CCS contested Ms. Leavitt's and Dr. Corn's assessments on the grounds that neither therapist was either a physician or conducted the assessment consistent with CCS guidelines. However, as found below, Chapter 26.5 places no such parameters on independent assessments. Both witnesses have extensive educational degrees, training and experience in their fields. Furthermore, to the extent that CCS contends that the assessments were conducted solely for educational purposes, unrelated to medical necessity, the contention is rejected. Dr. Haining himself testified in unequivocal terms that there is no difference between "medically necessary" and "educationally necessary" OT and PT and, that both services stem from the medical field. Dr. Corn also shared this view when she gave an example of working on Student's ability to hold her head up. Dr. Corn stated that the skill is required medically because it will help Student breathe better, assist in her food consumption, reduce the reliance on the G-tube and reduce respiratory infections. But, the same skill is required educationally as it will help Student's ability to see around the classroom, follow the teacher and learn visually.

63. CCS contends that Student had reached a plateau in her progress, when she failed to register any substantial progress in her OT and PT therapies and was no longer benefiting from direct one-to-one therapy with the therapist.[30] With respect to OT, CCS did not present an occupational therapist at the hearing to support its contentions. Furthermore, CCS's position is undermined by the fact that it is currently funding direct therapy from Pediatric Rehabilitation, pursuant to Dr. Haining's September 2012 prescription.

64. Ms. Leavitt was the only occupational therapist to testify at hearing and her November 2012 assessment report is the most current OT assessment presented by the parties. Ms. Leavitt previously worked with Student when Student was in the Early Start program and, was able to compare Student's progress over time.[31] Her assessment of Student was thorough and examined her functional communication, hand function, oral motor development, eating ability, positioning and ability to use her equipment. Ms. Leavitt also observed Student in multiple environments including her school setting. Ms. Leavitt opined that Student is capable of making progress and needs OT, particularly for oral motor development and hand functioning. Ms. Leavitt was persuasive and her testimony is given substantial weight.

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[30] In order for Student to continue with direct therapy, according to CCS, she needed to show substantial progress such as being able to hold her head up independently for a period of time, or being able to roll on her back independently.

[31] The Early Start program is administered pursuant to title 20 United States Code section 1431 et seq. The program is designed to provide intervention to "at risk" infants and toddlers between the ages of zero and three.

65. Mother persuasively testified that when OT services were reduced and ultimately ceased, Parents saw a decrease in Student's oral motor functioning, chewing skills and ability to control her head and neck. Due to the reduced oral motor functioning Student required an increase in delivery of her supplements through the G-Tube. Student also had to be pulled out of class for feeding more than she had needed when she was receiving OT.

66. With respect to PT, Dr. Corn believed that direct therapy should not have been terminated. There was a dispute as to whether Student was too young to be deemed to have reached a therapeutic plateau in her PT therapy. However, CCS's physical therapist, Ms. Grolle, never reviewed Dr. Corn's assessment or entered into discussion with Parents and the IEP team prior to the hearing, as required by Chapter 26.5. Therefore, CCS's disagreement with Dr. Corn's opinion is of limited value. Furthermore, CCS's position that Student had plateaued was undermined by Ms. Grolle's recommendation of an episodic model of service, designed to determine whether Student was capable of making further progress in her skills.

67. Ms. Grolle did not disagree with Dr. Corn's findings as far as Student's functioning levels and abilities. Dr. Corn's assessment was also thorough. She assessed Student's muscle tone, reflexes, range of motion and worked with Student in different positions. Dr. Corn was persuasive in her description of how she saw Student respond positively to the direct therapy she has provided to Student on three occasions, including the assessment in September 2012.

68. Dr. Corn and Ms. Leavitt's assessment reports and testimony are relied upon to determine an appropriate remedy. The evidence is used to identify Student's areas of need with respect to OT and PT and to arrive at an amount of a compensatory OT and PT award. The evidence has not been considered to determine what Student's prospective FAPE would be with respect to medically necessary OT and PT. Finally, while Student was not required to establish regression to recover for CCS's material failure to implement her IEP, Mother's testimony established that Student has suffered some regression in her fine motor skills.

69 Accordingly, in order to compensate Student for the lost direct OT and PT services determined in Factual Finding 61 above, CCS shall provide Student with 40 hours of direct compensatory OT, and 50 hours of direct compensatory PT services. The hours awarded here are based upon the loss of approximately 80 hours of OT and PT discussed above, take into account the restoration of services set forth below, and are based upon the needs identified in the independent assessments.

*Staff Training*

70. Staff training can be an appropriate remedy as the IDEA does not require compensatory services to be directly awarded to the pupil. Appropriate relief in light of the purposes of the IDEA may include an award of public agency staff training regarding the area of law in which the violations were found.

71. Here, the evidence established that CCS has failed to provide training to its staff regarding the interagency agreement. The lack of CCS staff's knowledge of their responsibilities under Chapter 26.5 is system wide in the county. This lack of training and knowledge had a direct relationship to the egregious procedural violations CCS committed with respect to Student. Student is young and likely to continue requiring CCS services for the considerable future. Based upon CCS's system wide failures and the likelihood that Student will be treated by various CCS staff over time, an order for system wide training is appropriate in this case. CCS shall provide training to its staff including, physicians, occupational therapists, physical therapist, and any other staff member who provides services to an eligible pupil pursuant to Chapter 26.5. The undersigned cannot order the local LEA's in Tuolumne County to attend the training. However, CCS shall make good faith efforts to coordinate the training with the Tuolumne County SELPA and local LEA's.

*Restoration of Services*

72. The evidence established that CCS unilaterally changed and reduced Student's medically necessary OT and PT beginning in November 2011 and continuing through September 2012, outside of and with disregard to the IEP development process and in disregard of Student's procedural safeguards under the IDEA. These actions denied Student a FAPE. CCS is required to utilize the IEP development process to obtain parental consent to any changes in Student's related OT and PT services that it recommends; or to use the due process hearing procedures to obtain an order from OAH to override parental denial of consent to changes in Student's services.[32]

73. Until such time as CCS follows the procedures set out in Chapter 26.5, the IDEA and Education Code section 56000 *et seq*., Student's medically necessary OT and PT services set forth in her June 3, 2011 IEP are restored. Effective on the date of this Decision, CCS shall provide Student with direct OT and PT services at the rate of two times per week, for 30 minutes per session. Any remaining sessions of OT from those agreed upon with Pediatric Rehabilitation may satisfy the weekly requirement for OT services. These services are separate from the award of compensatory education set forth above.

*Independent Assessments*

74. As discussed in Factual Findings 55 and 56, CCS failed to meet its obligation, beginning March 11, 2013, to review and provide recommendations with respect to Ms. Leavitt's and Dr. Corn's assessments of Student. CCS denied Parents and the IEP team

[32] CCS may request District to convene an IEP team meeting. CCS is not responsible for convening an IEP team meeting and, CCS has not been penalized in this Decision for the LEA's failure to convene an IEP team meeting. Nevertheless, CCS should make good faith efforts to work with the LEA to schedule such meetings. Should Parent disagree with CCS's recommendations at an IEP team meeting or, should the LEA refuse to call an IEP team meeting, CCS may file a due process hearing request with OAH.

valuable information that it could have provided regarding Student's medically necessary OT and PT needs and their relationship with Student's educationally necessary needs in those areas. An appropriate remedy for this is for CCS to review the assessments and convene an IEP team meeting.

*Additional Remedies*

75. Student requests that CCS be ordered to comply with IDEA requirements to participate in Student's IEP team meetings. Student failed to meet her burden to show that CCS did not participate in the development of Student's IEP. Accordingly, no order is required.

76. Student further requests that CCS be ordered to provide two hours per week of PT and one hour per week of OT, from therapists chosen by Parents, as prospective services for Student. Prospective services are based upon a determination of what constitutes FAPE for Student. Pursuant to Factual Finding 58, this Decision does not make a determination of what constitutes FAPE for Student prospectively. Accordingly, Student's request is denied.

## LEGAL CONCLUSIONS

*Burden of Proof*

1. As the petitioning party, Student has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Shaffer*).)

*General Provision of FAPE*

2. Under the IDEA and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE is defined as appropriate special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) In addition, the educational needs include functional performance. (Ed. Code 56345, subd. (a)(1).) The term "related services" (also known as "designated instruction and services" in California) includes, amongst other services, developmental, corrective and supportive services as may be required to assist a child to benefit from his or her education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Related services include, but are not limited to, transportation, speech and language therapy, OT and PT. (*Ibid.*)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court determined that school districts and other public agencies involved in the provision of a FAPE, are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id*. at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) There are two parts to the legal analysis of whether an LEA or other public agency has offered or provided a FAPE. First, the tribunal must determine whether the public agency has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs related to his or her educational disability, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid*.)

4. Procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23,* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3 (*Park*); *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) However, once a procedural flaw rises to the level of causing a denial of FAPE, a further analysis of whether the pupil was denied a substantive FAPE is not required, and the second part of the two-part test set out above need not be conducted. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. June 13, 2013) ___F3d___ 2013 WL 2631518 (*Doug*).)

5. In *Rowley* the Supreme Court placed great emphasis on the importance of the procedural protections of the IDEA, especially those that guarantee participation by parents:

> ... [W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.

(*Rowley, supra*, at pp. 205-206.)

*Importance of Parental Participation in Decision Making Process*

6. "Among the central procedural safeguards in the IDEA and related California statutes is the right of parents to be involved in the development of their child's educational plan." (*Doug, supra*; *Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. (2003), 317 F.3d 1072, 1077; *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

A school district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

7. The Supreme Court has noted that the IDEA assumes parents, as well as districts, will cooperate in the IEP process. (*Shaffer, supra,* 546 U.S. at p. 53 [noting that "[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools", and describing the "significant role" that "[p]arents and guardians play ... in the IEP process"]; see also, *John M. v. Board of Educ. of Evanston Tp. High School Dist. 202* (7th Cir. 2007) 502 F.3d 708, 711, fn. 2; *Patricia P. v. Bd. of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 486; *Clyde K. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1400, fn. 5[rejecting a "my way or the highway" approach by parents' attorney].)

8. The IEP development process is designed to ensure that public agencies, parents and other relevant members of the child's education team have an opportunity to meet and openly discuss development of the child's IEP. When a public agency goes outside that process and unilaterally changes services provided for in the child's IEP, that public agency violates a cornerstone principle of the IDEA.

*Delegation of Responsibilities to Public Agencies*

9. The IDEA allows states to determine for themselves whether responsibilities for the provision of a FAPE shall be delegated to public agencies other than education agencies and how those agencies shall collaborate to ensure the delivery of a FAPE to eligible pupils. Individual states are allowed to designate that their education agencies, such as the California Department of Education, may enter into interagency agreements with other state agencies, such as CCS, for the provision of related services, such as medically necessary services, that are required to ensure the provision of a FAPE to the state's special education eligible pupils. (20 U.S.C. § 1412(a)(12)(A); 34 C.F.R. § 300.154(c)(1), (2); *Letter to Forer*, 211 IDELR 244, (OSEP[33] November 4, 1980).) Specifically, OSEP noted that a "State may assign the burden of funding FAPE to any State agency or, through interagency agreements, to any combination of State agencies. . . ." (*Ibid*.)

10. For purposes of special education, California defines "public agency" as a "school district, county office of education, special education local plan area . . . or any other public agency under the auspices of the state or any political subdivisions of the state providing special education *or related services* to individuals with exceptional needs." [Emphasis added.] (Ed. Code, § 56028.5.) It includes within the definition of "public

[33] OSEP is the Office of Special Education Programs, a division of the United States Department of Education charged with administering the IDEA and developing its regulations.

agency" all agencies identified in federal law under section 300.33 of title 34 of the Code of Federal Regulations.[34] (*Ibid*.)

*Interagency Responsibilities Under Chapter 26.5*

11. The rights and responsibilities of public agencies charged with jointly serving children with special education needs are set out in Chapter 26.5 and related regulations.[35] (Gov. Code, § 7570 *et seq*.; Cal. Code Regs., tit. 2, § 60000 *et seq*.) In enacting Chapter 26.5, the Legislature intended to ensure the "maximum utilization of all state and federal resources" available to provide eligible pupils with a FAPE and related services. (Gov. Code, § 7570.) Provision of OT and PT as related services is the joint responsibility of the Superintendent of Public Instruction and the California Department of Health Services.(Gov. Code, § 7575.) The Superintendent of Public Instruction has delegated these responsibilities to the LEA's, usually school districts. The California Department of Health Services has similarly delegated these responsibilities to the local CCS agency of each county. Accordingly, CCS is the "public agency" in Tuolumne County, under the auspices of the state, required to collaborate with the LEA's to provide medically necessary OT and PT to eligible pupils.[36]

12. California has distinguished the type of OT and PT each public agency is to provide. The public education agency is required to provide educationally necessary OT and PT, while CCS is required to provide medically necessary OT and PT.[37] (Gov. Code, § 7575, subds. (a)(1) & (2).) Furthermore, for purposes of the IDEA, CCS is required to provide medically necessary OT and PT services only when they are contained in the pupil's IEP.

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[34] CCS contends that by referencing the federal regulations, the Legislature intended to exclude it from the definition of "public agency" because the federal regulation only refers to agencies providing education and not "related services." To follow such an interpretation of the statute would render the purpose of the statute defeated. CCS's argument is unpersuasive.

[35] The regulations concerning interagency responsibilities under Chapter 26.5 apply specifically to the Department of Health Services, Department of Social Services, California Department of Education, and their designated local agencies. (Cal. Code Regs., tit. 2, § 60000.)

[36] Evidence established that CCS in Tuolumne County, is a "dependent agency" pursuant to Health and Safety Code section 123850, with decision making power controlled by the regional CCS office in Sacramento. The internal administrative structure of CCS was not relevant for purposes of determining the issues in this matter.

[37] Medically necessary OT and PT are defined as services "directed at achieving or preventing further loss of functional skills, or reducing the incidence of severity of physical disability." (Cal. Code Regs., tit. 2, § 60300, subd. (n).)

(Gov. Code, § 7575, subd. (a)(1).) Therefore, CCS's obligations are directly tied to the pupil's IEP.

13. As part of its responsibilities, CCS has to ensure that OT and PT assessments are conducted by qualified medical personnel. (Gov. Code, § 7572, subd. (b).)[38] A related service of medical OT or PT may only be placed in a pupil's IEP if the qualified assessor conducting the assessment has made a recommendation for the service. (Gov. Code, § 7572, subd. (c).) Specifically, the related service shall only be added to the pupil's IEP by the IEP team if the qualified assessor recommended the service "**in order for the child to benefit from special education**." [Emphasis added.] (*Ibid*.)

*Interagency Agreements*

14. California Code of Regulations, title 2, section 60310, subdivision (a), requires the local CCS agency and the county Superintendent of Schools or SELPA director to each assign a liaison and execute an interagency agreement at the county level. Subdivision (c) of California Code of Regulations, title 2, section 60310, requires the interagency agreement address multiple aspects of the agencies coordination of responsibilities, including the following: identifying contact persons within each agency; processes to exchange medical and educational records of the pupil; time lines to give notice of any IEP team meetings and meetings changing CCS recommendations; process for participation in IEP team meetings; process for developing or amending therapeutic services indicated in the pupil's IEP; and, process for resolving conflicts between the agencies.

*Responsibilities Regarding Assessments and IEP Team Meetings*

15. It is the responsibility of CCS to determine whether an eligible pupil, or a pupil with a private medical referral, needs medically necessary OT or PT. (Gov. Code, § 7575, subd. (b).) A medical referral by CCS shall be based upon a written report from a licensed physician and surgeon who has examined the pupil. The report must include specific information, including the relationship of the medical disability to the pupil's need for special education and related services.[39] (Gov. Code, § 7575, subds. (b)(1)–(5).) CCS

[38] The delivery of mental health services under Chapter 26.5 underwent a major revision in 2011. (see *California School Boards Ass'n v. Brown* (2011) 192 Cal.App.4th 1507.) Consistent with those changes Government Code section 7572 was amended in 2012, effective January 1, 2013, to remove reference to the mental health services. The version cited to herein is the version effective 2013, however, CCS's obligations remained the same under both versions of Government Code section 7572 during the time periods addressed in this Decision.

[39] The evidence established that CCS's reports did not inform Student's IEP team of the relationship between Student's medical disability and her need for special education and related services. However, Student did not raise this as a specific issue. Accordingly, no findings are made as to whether this deficiency in CCS's reports denied Student a FAPE.

shall provide medically necessary OT and PT, by reason of a medical diagnosis and when contained in the pupil's IEP. (Gov. Code, § 7575, subd. (a)(1).) CCS may provide the services by contracting with another public agency, qualified individual, or a state-certified nonpublic nonsectarian school or agency. (Gov. Code, § 7575, subd. (c).)

16. CCS's assessment is conducted through a MTC, where the medical necessity must be based upon the pupil's physical and functional status. (Cal. Code Regs., tit. 2, § 60323, subd. (a).) The MTC shall review the therapy plan to ensure that it includes all required information. (Cal. Code Regs., tit. 2, § 60323, subd. (b).) The MTC physician is responsible for the approval of the therapy plan and shall write the prescription for those services. (Cal. Code Regs., tit. 2, § 60323, subd. (c).) Medically necessary OT and PT is to be provided by or under the supervision of a registered OT or licensed PT. (Cal. Code Regs., tit. 2, § 60323, subd. (f).)

17. Whenever an assessment has been conducted by CCS and a recommendation has been made, that recommendation shall be discussed with the pupil's parent and relevant members of the IEP team prior to the meeting of the IEP team. (Gov. Code, § 7572(c)(1).) If there is disagreement regarding the recommendation, the parent shall be notified in writing and may require the individual who made the recommendation to attend pupil's IEP team meeting. Following discussion and review, the recommendation of the CCS person who conducted the assessment shall be the recommendation of the IEP team members who are attending on behalf of the LEA. (*Ibid.*) This does not hamper the LEA's ability to provide OT or PT services that are educationally necessary under Government Code section 7575, subdivision (a)(2).

18. Furthermore, pursuant to Government Code section 7572, subdivision (d), whenever a related service of medically necessary OT or PT is recommended, the LEA shall invite CCS's representative to attend the IEP team meeting to determine the need for the service and participate in developing the IEP. If the representative cannot attend in person, written information concerning the need for the service shall be provided to the IEP team and the representative may participate via a conference call; and, if the representative of CCS is not able to participate in the IEP team meeting at all, the LEA shall ensure that a qualified substitute is available to explain and interpret the evaluation for the IEP team. (*Ibid*.)

19. CCS is required to provide to the pupil's IEP team a copy of the assessment and evaluation report, and the proposed therapy plan, which is required to include, among other things: the identity of the specific related services required, including the type of OT or PT intervention, treatment, consultation or monitoring; and the proposed initiation, frequency and duration of the services to be provided. (Cal. Code Regs., tit. 2, § 60325, subds. (a)(1)-(5).)

20. In expanding upon the statutes under Chapter 26.5, the regulations require not only CCS participation in the IEP team process, but also set forth specific time lines concerning changes in the pupil's services. CCS is required to notify the IEP team and parents in writing within five days of any decision to "increase, decrease, change the type of

intervention, or discontinue services." (Cal. Code Regs., tit. 2, § 60325, subds. (c).)[40] The LEA is to convene an IEP team meeting if given such notice or when a review is requested by the parent or other authorized persons. (Cal. Code Regs., tit. 2, § 60325, subds. (d).)

*Procedural Safeguards and Due Process Rights Specific to Chapter 26.5*

21. Chapter 26.5 confers upon an eligible pupil and her parents all of the procedural and substantive safeguards of the IDEA and related state special education law. Any disputes between the parents and the IEP team members representing the public agencies regarding the recommendations of CCS or recommendations of an independent assessment shall be resolved pursuant to Education Code sections 56000 et seq . (Gov. Code, § 7572, subd. (c)(3).) All public agencies, as defined by Education Code section 56028.5, and not just LEA's, are required to ensure the procedural and substantive safeguards of state and federal special education law.

22. Government Code section 7586, subdivision (a), states in unequivocal language that "[a]ll state departments, and their designated local agencies" are governed by the procedural safeguards conferred upon a pupil and parent pursuant to title 20 United States Code section 1415. It therefore confers upon OAH jurisdiction to resolve all special education disputes between a parent, or pupil, and the public agencies with respect to any services addressed by Chapter 26.5.[41] (Gov. Code, § 7586, subds. (a) & (c).)

23. California Code of Regulations, title 2, section 60550, further addresses the due process hearing rights with respect to interagency responsibilities for the provision of services to pupils with disabilities. The provisions set forth reaffirm the due process rights discussed above. The regulation states that the parent has the right to challenge any public agency decision with respect to the "proposal or refusal of a public agency to initiate or change the identification, assessment, educational placement, or the provision of special education and related services to the pupil." (Cal. Code Regs., tit. 2, § 60550, subd. (a); see also Ed. Code, § 56501, subds. (a)(1) & (2).) Therefore, as Parents have done in this case, CCS's determination of the level and type of medically necessary OT and PT for an eligible pupil may be challenged through a special education due process hearing.

24. California Code of Regulations, title 2, section 60550, subdivision (f), states that the hearing decision shall be the final determination "regarding the provision of educational and related services, and is binding on all parties." Within the regulation, all due

[40] California Code of Regulations, title 2, section 60310, subd. (c)(5) requires 10 days notice. To the extent that there is any inconsistency between the two regulations, it is immaterial to the outcome of this matter.

[41] OAH conducts special education due process hearings by virtue of an interagency agreement with the California Department of Education as required by Education Code section 56504.5, subdivision (a).

process rights and proceedings concerning pupils who are eligible for special education and receive related services from CCS, are subordinated to the due process rights granted specifically in Chapter 26.5. (Cal. Code Regs., tit. 2, § 60550, subd. (e).) Therefore, all rights available to Student to challenge decisions by an LEA, as set out in title 20 United States Code section 1415 and Education Code section 56501, and related statutes, are available to Student equally as to CCS.

*CCS's Challenge to OAH's Jurisdiction*

25. In this matter, CCS contends that it has the responsibility to determine whether a pupil requires medically necessary OT and PT. (Health & Saf. Code, § 123870, Gov. Code, § 7582.) CCS further contends that it has the unilateral authority to reduce a pupil's services. CCS is correct that it has the sole authority to determine if a pupil is eligible for medically necessary OT and PT. However, once that determination is made, and once an IEP team places those services in the child's IEP, the child or the parents have the right to challenge any changes to those services that CCS thereafter recommends to make.

26. CCS claims that, pursuant to California Code of Regulations, title 2, section 60323, subdivision (a), upon finalization of the placement and services by the IEP team, any further changes to CCS services determined through the MTC process may be executed unilaterally, as CCS determines, without further regard to the IEP development process. That regulation grants no such authority to CCS. Chapter 26.5, and the controlling regulations, place in the hands of a pupil and her parents all of the protections set forth in the IDEA and Education Code section 56000 et seq. One of the fundamental protections offered to parents is the opportunity to participate in the decision-making process regarding the provision of a FAPE to the child. Allowing a public agency charged with the provision of a FAPE, with respect to a related service, to determine for itself when, what and how to change the service that is part of the child's IEP would decimate the purposes of Chapter 26.5.

27. CCS further contends that any appeals of its decisions, even for pupils who have CCS services in their IEP's, must be pursued through the process set out in California Code of Regulations, title 22. A client of CCS has the right to appeal a decision by CCS, except if the decision concerns a physician's order or termination of a service. (Cal. Code Regs., tit. 22, § 42140, subd. (a).) A challenge to a physician's order results in the client being provided a list of names of three other CCS paneled physicians, from which the client chooses one to review the CCS decision, and all parties are bound by the determination of the chosen physician. (*Ibid*.) No further right to appeal the physician's order exists. Appeals of all other CCS decisions are appealed first to the local CCS agency charged with serving the client. (Cal. Code Regs., tit. 22, § 42160.) The CCS agency internally determines its own client's appeal. If the client remains unsatisfied, then the client may pursue a state level fair hearing. (Cal. Code Regs., tit. 22, §§ 42180 *et seq*.) CCS contends that Student and her Parents were required to pursue the appeals process set forth in California Code of Regulations, title 22. Here, Student has challenged the decisions made by the CCS physician regarding her medically necessary OT and PT that are also contained in her IEP. Under CCS's argument, if California Code of Regulations, title 22, were her sole

remedy, Student would have no right to a special education due process hearing on those issues. Such a result would be contrary to the due process rights expressly conferred under Chapter 26.5, as discussed above. Accordingly, CCS' contention that Student's sole right to appeal its decisions lies under California Code of Regulations, title 22, is not supported by the applicable law and is rejected.

28. A statute must be interpreted in light of other provisions in the same statutory scheme, and harmonized with them in order to give all of them effect. (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519.) A detailed review of Chapter 26.5, title 20 United States Code section 1415, related sections of the Education and Health and Safety Codes, and supporting regulations, reveals the clear and simple intent of the Legislature. Chapter 26.5 exists to create a "one-stop shop" for the determination of interagency responsibilities of related services, and provide for resolution of disputes concerning those services. The intent was to create a seamless system that could serve families, such as Student's family, by requiring various agencies jointly charged with the provision of a FAPE, to coordinate and collaborate with one another so that the pupil with a disability and her family are not required to navigate multiple systems administered by separate agencies. As determined in this case, the lack of collaboration and coordination between Student's school district and CCS, combined with CCS's staff's lack of basic knowledge of the system, defeated the very intent of Chapter 26.5.

*Determination of Issues*

*Issue No. 1(a): Did CCS commit procedural violations that resulted in a denial of a FAPE to Student during the 2011-2012 and 2012-2013 school years, through the present, by failing to actively participate in Student's IEP team meetings?*

29. As set forth in Legal Conclusions 14, 17 and 18, CCS is required to participate in the development of Student's IEP. Failure to participate in the development of Student's IEP would constitute a procedural violation. Based upon Factual Findings 20, 36 and 49, the evidence established that CCS participated in the development of Student's IEP's to the extent required by Chapter 26.5, for the time periods at issue in this case. CCS is not charged with the responsibility to convene and conduct IEP team meetings. Rather, it is an invitee and its responsibilities are triggered once that invitation is made. CCS has responsibilities to notify the LEA's of changes in services and to cooperate with the scheduling of IEP team meetings. With respect to the June 2011 IEP team meeting, the LEA did not notify or invite CCS and therefore, CCS cannot be penalized for failing to participate in the IEP team meeting. With respect to the August 2012 and March 2013 IEP team meetings, CCS was present at both meetings. CCS timely provided its recommendations and treatment plans to the IEP team and Parents. CCS members of the IEP team were readily available to provide any further information and to discuss Student's medically necessary OT and PT. The fact that Parents did not agree with CCS's recommendations does not establish a failure to participate in the IEP team meeting process. Accordingly, Student was not

denied a FAPE as Student did not establish that CCS failed to participate in her IEP team meetings.

*Issue No. 1(b): Did CCS commit procedural violations that resulted in a denial of a FAPE to Student during the 2011-2012 and 2012-2013 school years, through the present, by unilaterally making decisions outside of the IEP team meeting process?*

30. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686] (*Honig*); 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) While *Honig* concerned the unilateral removal of children with behavior issues by the school district under the Education of the Handicapped Act (EHA), the Supreme Court's restrictions upon self-help are applicable here.[42] In admonishing the school district for unilaterally changing the pupil's placement without regard to the IEP development process, the Court noted that parents are not the only parties afforded procedural rights under special education law. The public agency also has the right to, and can seek redress through the administrative hearing process when parents do not consent to a change in placement or services that the public agency believes is warranted. (*Honig, supra*, at pp. 326-327.)

31. Parental consent to changes in services listed in a pupil's IEP is required prior to implementation of the changes. (20 U.S.C. § 1414(a)(1)(D)(i)(II); 34 C.F.R. § 300.300(b) (2006)[43]; Ed. Code, § 56346, subd. (a).) Parents may consent to changes in an IEP either by agreeing to a new IEP or by executing an addendum to the existing IEP. (20 U.S.C. § 1414(d)(3)(D), (F); 34 C.F.R. § 300.324(a)(4)(i), (a)(6); Ed. Code, § 56380.1, subds. (a), (b).) Where a parent does not consent, any change may only be implemented through the order of a judge or hearing officer after a due process hearing sought by the public agency for the purpose of overriding the lack of parental consent. (Ed. Code, § 56346, subds. (e), (f).)

32. By definition, provision of a FAPE requires delivery of special education and related services "in conformity with" a student's IEP. (20 U.S.C. § 1401(9)(D).) However, minor failures by in implementing an IEP should not automatically be treated as violations of the IDEA. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 821.) Rather, a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Id.* at p. 822.) The student need not demonstrate educational harm in order to prevail. (*Ibid.*)

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[42] The EHA was a precursor to the IDEA.

[43] All subsequent references to the Code of Federal Regulations are to regulations promulgated in 2006.

33. Based upon Factual Findings 29, 44 and 45, CCS committed a procedural violation by unilaterally reducing Student's medically necessary OT and PT services in November 2011, and again in September 2012. It unilaterally implemented these changes without the benefit of an IEP team meeting and development of a new IEP for Student. By so doing, it denied Parents the ability to have a discussion at the IEP team meeting and the benefit of input from all IEP team members about the proposed changes. CCS's decisions resulted in changes to Student's services outside of the IEP process and significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to Student. Accordingly, based upon Legal Conclusions 30 and 31, CCS denied Student a FAPE.

34. As set forth in Factual Finding 28 and 35, Dr. Haining knew that Parents were not in agreement with the changes CCS proposed to Student's services. Ms. Grolle should have also known, because Parents repeatedly asked for direct OT and PT services to be restored. Furthermore, Parents never gave written consent to the changes either through an IEP addendum or through a revised IEP. CCS's unilateral implementation of the changes it prescribed in November 2011 and September 2012, was the very type of self-help that is prohibited under *Honig*, as set forth in Legal Conclusion 30. CCS was not without recourse if it felt it could not resolve the dispute with Parents, or if it felt that the LEA would not convene an IEP team meeting. CCS could have utilized the IDEA due process administrative hearing procedures, as Parents did here, to override Parents' refusal to consent.[44] Therefore, CCS's unilateral implementation of changes in Student's related services violated Student's procedural safeguards under the IDEA and denied Student a FAPE.

35. Furthermore, CCS's unilateral actions resulted in a loss of related services to Student for approximately 20 months, as set forth in Factual Findings 61. CCS is not required to implement all aspects of the IEP, only the medically necessary OT and PT services agreed upon in the IEP. Student's last agreed upon and implemented IEP with respect to OT and PT services was the June 2011 IEP, calling for each therapy to be delivered two times per week, for 30 minutes per session. CCS's discontinuation of those services therefore also constituted a denial of FAPE because it caused Student a deprivation of educational benefits.[45]

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[44] CCS contends that Government Code section 7585 prohibits agencies from using the special education due process proceedings to resolve interagency disputes. This is true, however, Education Code section 56501, subdivision (a), specifically grants a public agency involved in any decisions regarding a pupil the right to file a special education due process hearing to resolve a dispute between that agency and the pupil or parents. Therefore, CCS could have pursued a special education due process hearing rather than resorting to unilaterally implementing changes in Student's services, over parental objection.

[45] Student did not allege a violation of her stay-put rights, which would have been triggered upon her filing of the complaint in this matter on October 3, 2012. Because the

*Issue No. 1(c): Did CCS commit procedural violations that resulted in a denial of a FAPE to Student during the 2011-2012 and 2012-2013 school years, through the present, by failing to consider independent assessments?*

36. A parent is entitled to obtain and submit an independent assessment regarding a related service to the IEP team. (Gov. Code, § 7572, subd. (c)(2).) If the assessment is one concerning OT or PT, upon submission to the IEP team, it shall be reviewed by the qualified medical personnel of CCS who conduct OT and PT assessments on behalf of CCS. (*Ibid.*) The statutory language is clear that CCS's obligation is not triggered until the assessment is submitted to the pupil's IEP team. The recommendation of the person who reviews the independent assessment shall be reviewed and discussed with the parent and appropriate members of the IEP team prior to the meeting of the IEP team. (*Ibid*.) The recommendation of the qualified person who reviewed the independent assessment shall become the recommendation of the IEP team members who "are attending on behalf of the local agency." (*Ibid.*)

37. Under Chapter 26.5, the Legislature's use of language with respect to assessments is of significance. Government Code section 7572, subdivision (c)(2), uses the term "independent assessment" when setting out the process of consideration of outside assessments. It contains no further qualifiers or conditions on what an "independent assessment" is. It does not require that the independent assessment be conducted by, or recommendations from the assessment be those of a licensed physician or surgeon. Comparatively, when discussing CCS's determination process for medically necessary OT and PT, Government Code section7575, subdivision (b), requires that the eligibility be determined based upon a medical referral by a licensed physician or surgeon. Had the Legislature intended to limit independent assessments to be those by physicians or surgeons, it would have so stated.

38. Here, Parents presented Dr. Corn's assessment report to Dr. Haining of CCS in September 2012, but not to Student's IEP team. Thus, this did not trigger CCS's responsibility to review the assessment report, meet with Parents and relevant members of the IEP team and make recommendations based upon the report, if any. Once Parents presented Dr. Corn's and Ms. Leavitt's assessment reports to the IEP team in March of 2013, as found in Factual Findings 54 through 56, CCS's obligations under Chapter 26.5 were triggered. By failing to follow those obligations, CCS denied Student a FAPE because it significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student.

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violation was not alleged, no findings are made as to what Student's stay-put rights were and whether CCS violated those rights.

*Issue No. 2(a) and 2(b): Did CCS deny Student a FAPE during the 2011-2012 and 2012-2013 school years, through the present, by failing to provide adequate OT and PT services?*

39. Based upon Legal Conclusions 4, 33 through 35 and 38, CCS failed to comply with the procedural requirements of the IDEA and the violations have resulted in a denial of FAPE to Student. Accordingly, a further analysis under the second prong of the two-part test set out in Legal Conclusions 3 and 4, as to whether CCS's offers of services substantively denied Student a FAPE, is not necessary. No findings are made as to these issues.

*Remedies*

40. An LEA or other public agency may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. It has long been recognized that equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361]; *Parents of Student . v. Puyallup School District No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 [*Puyallup*].) Compensatory education is an equitable remedy. (*Id., supra*, at p. 1497.) The law does not require that day-for-day compensation be awarded for time missed. (*Ibid*.) Relief is appropriate that is designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid*.)

41. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*) When determining an award of compensatory education, the inquiry must be fact-specific. (*Ibid*.)

42. Staff training is an appropriate remedy as the IDEA does not require compensatory education services to be awarded directly to a student. An order providing appropriate relief in light of the purposes of the IDEA may include an award of public agency staff training regarding the area of the law in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Park, supra,* 464 F.3d 1025, 1034 [ student who was denied a FAPE due to failure to properly implement his IEP could most benefit by having his teacher appropriately trained to do so]; *Student v. Reed Union School District,* Cal.Ofc.Admin.Hrngs. Case No. 2008080580 [requiring training on predetermination and parental participation in IEP's]; *San Diego Unified Sch. Dist.* (Cal. SEA 2005) 42 IDELR 249 [105 LRP 5069] [requiring training regarding pupil's medical condition and unique needs].)

43. Based upon Legal Conclusions 33 through 35 and 38, CCS has been determined to have denied Student a FAPE and Student is entitled to a remedy. As set forth in Factual Findings 61 through 74, Student is entitled to compensatory OT and PT; reinstatement of her levels of OT and PT services to those levels CCS was required by Student's IEP's to provide prior to the changes in November 2011; and a fresh review of the

independent assessments conducted by Ms. Leavitt and Dr. Corn. Furthermore, an order requiring training of CCS staff is appropriate.

## ORDER

1. Tuolumne County CCS shall provide Student with 40 hours of direct compensatory OT. These compensatory services shall be provided at a place, and at times, and for durations, convenient to Parents. Parents shall have until December 31, 2014, to exhaust these compensatory services. The CCS occupational therapist shall develop goals to be addressed by the compensatory services within 30 days of the date of this decision, in conjunction with Parents. A physician's prescription shall not be required for these compensatory services. Should CCS suffer the loss of OT staff during the period of this compensatory award, the time to exhaust the award shall be extended consistent with the time it takes CCS to procure the services of another occupational therapist. Finally, to the extent that CCS learns that an occupational therapist holds a professional objection to the concept of compensatory therapy, CCS shall provide therapy through another paneled therapist.

2. Tuolumne County CCS shall provide Student with 50 hours of direct compensatory PT services. These compensatory services shall be provided at a place, and at times, and for durations convenient to Parents. Parents shall have until December 31, 2014, to exhaust these compensatory services. The CCS physical therapist shall develop goals to be addressed by the compensatory services within 30 days of the date of this decision, in conjunction with Parents. A physician's prescription shall not be required for these compensatory services. Should CCS suffer the loss of PT staff during the period of this compensatory award, the time to exhaust the award shall be extended consistent with the time it takes CCS to procure the services of another physical therapist. Finally, to the extent that CCS learns that a physical therapist holds a professional objection to the concept of compensatory therapy, CCS shall provide therapy through another paneled therapist.

3. Effective as of the date of this Decision, Tuolumne County CCS shall reinstate Student's OT and PT services as provided in her last agreed upon IEP of June 3, 2011, and provide Student with direct OT and PT at the rate of two times per week, for 30 minutes per session.[46]

4. Within 30 days of the date of this Decision, Tuolumne County CCS shall review the assessment reports of Ms. Leavitt and Dr. Corn, along with any and all more recent independent assessments, if any, and, it shall meet with Parents and appropriate

[46] If CCS believes these services are not medically necessary, it must follow the applicable procedures set forth in Chapter 26.5 and related Education Code sections to either seek to change the services through the IEP development process or seek an order from OAH through a due process hearing pursuant to Education Code section 56501.

members of Student's IEP team prior to the IEP team meeting; and cooperate with the LEA to schedule an IEP team meeting to review all reports. Tuolumne County CCS's recommendations shall become the recommendations of District members of Student's IEP team to the extent that the IEP team adopts those recommendations as medically necessary.

5. Tuolumne County CCS shall provide training to its staff including, physicians, occupational therapists, physical therapist, and any other staff member who provides services to an eligible pupil pursuant to Chapter 26.5. The training shall cover the policies and procedures set forth in Chapter 26.5, related regulations, and the interagency agreement with the local LEA's. CCS shall have 90 days from the date of this decision to complete the training, and shall provide Parents documentation showing when the training occurred, how long the training was and what topics were covered.

6. All of Student's remaining requests for relief are denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issue Nos. 1(a) and 1(b). Student partially prevailed on Issue No. 1(c). No determination was made with respect to Issue Nos. 2(a) and 2(b).

## NOTICE OF APPEAL RIGHTS

This is a final administrative decision, and all parties are bound by this decision. The parties are advised that they have the right to appeal this decision to a court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505 subd. (k).)

Dated: July 15, 2013

/s/

BOB N. VARMA
Presiding Administrative Law Judge
Office of Administrative Hearings